IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

DANA COOPER, individually and On behalf of all others similarly Situated,	)	
Plaintiff,	)	
vs.	)	Case No. 4:16-cv-01293-DGK
INTEGRITY HOME CARE, INC.,	)	
Defendant.	)	

DEFENDANT'S REPLY SUGGESTIONS IN SUPPORT OF ITS MOTION TO DISMISS

COMES NOW defendant, Integrity Home Care, Inc. ("Integrity"), and for its Reply Suggestions in Support of its Motion to Dismiss Plaintiff's Amended Complaint (Doc. 32) states and suggests as follows:

Plaintiff's Amended Complaint must be dismissed because the "single dispositive legal issue," as Plaintiff recognized it, is resolved by the fact that 29 C.F.R. 552.109(a) (the "Regulation") could not have become effective on January 1, 2015. Since Plaintiff's Complaint hinges entirely on her argument that the Regulation *did* become effective on that date, Plaintiff fails to state a claim upon which relief may be granted. Integrity acknowledges the mixed holdings on this issue coming from various district courts, but respectfully emphasizes this Court's authority to reach its own conclusion, even if that conclusion is not the majority view. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 *fn. 7 (2011).

Indeed, the timeline of various cases on this issue shows several courts deciding *against* retroactivity even when they were presumably aware of other courts, some in the same circuit, deciding in favor of retroactivity. For example, within the Second Circuit, retroactivity was *rejected* in *Alves v. Affiliated Home Care of Putnam, Inc.*, 16-CV-1593 (KMK), 2017 WL 511836 (S.D.N.Y. Feb. 8, 2017), almost a year after retroactivity was upheld in *Kinkead v. Humana, Inc.*, 3:15-CV-01637(JAM), 2016 WL 3950737 (D. Conn. July 19, 2016). Though *Kinkead* is the case most widely cited in favor of retroactivity, a district court within the Fourth Circuit also rejected retroactivity almost a year after *Kinkead* in *Sanchez v. Caregivers Staffing Services, Inc.*, 1:15-CV-01579, 2017 WL 380912, at *2–3 (E.D. Va. Jan. 26, 2017). Plaintiff uses basically the same argument to suggest *Dillow v. Home Care Network, Inc.*, 1:16-CV-612, 2017 WL 749196 (S.D. Ohio Feb. 27, 2017), which found in favor of retroactivity, undermines the same district's rejection of retroactivity a year earlier in *Bangoy v. Total Homecare Sols., LLC*, 1:15-CV-573, 2015 WL 12672727 (S.D. Ohio Dec. 21, 2015), the case most widely cited in opposition to retroactivity.

From this patchwork of decisions, it is clear the issue is far from settled, and the question for this Court warrants a close analysis.[1] Integrity respectfully submits that, because there was never any law in existence prior to the date of the Regulation's *vacatur* that obligated Integrity to pay Plaintiff overtime, the conclusion of this Court's analysis should be that dismissal is the right, just, and only option.

I. Retroactive application of the Regulation is inappropriate in these circumstances.

The most critical distinction between recent cases concerning the Regulation, such as this one, and general "retroactivity" cases such as *Beam* and *Harper*, has not been adequately articulated by other litigants, and consequently by other courts. Specifically: because the DOL Regulation at issue in this case was vacated before ever going into effect, the D.C. Appeals Court decision in *Weil* makes a *purely prospective* approach the appropriate application of the Regulation itself. The *Beam* and *Harper* line of decisions do not foreclose such an approach, nor do they render the first decision by any other district court on this issue the "controlling interpretation of federal law." *Harper*, cited frequently by proponents of retroactivity, merely sets out the unsurprising rule that the *Supreme Court's* interpretation of federal law is controlling, even as applied to conduct and open cases pre-dating the Court's ruling which sets out that interpretation. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993).

---

[1] A District Court in Colorado aptly remarked, "the Court reads *Bangoy*, *Kinkead*, *MCI*, and the various authorities they rely upon together, and is left with the firm conclusion that there is no clear and unambiguous rule of law governing this situation." *Collins v. DKL Ventures, LLC*, 16-CV-00070-MSK-KMT, 2016 WL 8458918, at *3 (D. Colo. Sept. 21, 2016).

Harper's holding is logical, and not in conflict with Integrity's position: where the Court is tasked with interpreting *existing* law, retroactivity settles dispute about what that particular law has meant since its inception. Conversely, the Regulation at issue in this case never became "existing law" before October 13, 2015. That is significant because the *Weil* court's legal "interpretation" on appeal concerned only: (1) whether the DOL had authority to make the Regulation, and (2) whether the Regulation was a reasonable exercise of the DOL's authority, not arbitrary or capricious.[2] Applying *Weil*'s holding in favor of the DOL by reversing the *vacatur* was a proper, limited application of retroactivity under *Harper* (instead of, for example, announcing the court's interpretation of the DOL's authority would only apply to future regulations). However, applying *Weil* to effectively *enact the entire Regulation* for the first time beginning on a date in the past, and *triggering immediate accrual of liability under a law that did not previously exist*, would not be a proper "retroactive interpretation" of the kind contemplated by *Harper* and its predecessors. In fact, it would not be "interpretation" at all; it would be a vehicle for announcing an entirely new law, and thus must have only prospective effect.

While the constructive fiction that the D.C. District Court's *vacatur* never existed may be necessary to its reversal, that fiction is only procedural where no law is yet in effect. Plaintiff and others who have taken her position propose an entirely different fiction, one which would not only reaffirm the

[2] "The Department contends that its revised third-party-employer regulation lies within the scope of its rulemaking authority under the general agency delegation in § 29(b) of the 1974 Amendments, as confirmed by the Supreme Court's decision in *Coke.* The Department further argues that the new regulation is a reasonable exercise of the Department's authority at *Chevron* step two and is neither arbitrary nor capricious. We agree with the Department and uphold the regulation." *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1090 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2506, 195 L. Ed. 2d 839 (2016).

DOL's authority, but would go further and needlessly fabricate the very *existence* of a law, not just a controlling interpretation, allowing them to exploit for financial gain the ambiguous circumstances under which employers were forced to make business decisions by speculating when, if ever, the Regulation might become law.

II. Prospective application of the Regulation is the most appropriate approach.

Most district courts that have permitted the fiction Plaintiff proposes, applying the Regulation retroactively, seem to have done so as if the only alternative was "modified" or "selective prospectivity" However, that is not the case. This issue is uniquely suited to a fully or purely prospective approach. Unlike "selective prospectivity," pure prospectivity would not permit the Regulation to "shift and spring" on the equities of any particular case—a primary concern cited in support of retroactivity. As explained by one district court:

> [U]nder a fully prospective approach, the DOL regulation was vacated by the District Court before it took effect, and the "new" rule of law by the D.C. Circuit reinstating that regulation would be effective for all employees only after August 21, 2015 (or, arguably, after October 13, 2015, when the Mandate from the Court of Appeals issued).

Collins v. DKL Ventures, LLC, 16-CV-00070-MSK-KMT, 2016 WL 8458918 (D. Colo. Sept. 21, 2016).

Despite implication to the contrary by proponents of retroactivity, *Beam* and its progeny have not foreclosed pure prospectivity. In fact, *Beam* expressly left it intact, as the Court stated, "[w]e do not speculate as to the bounds or propriety of pure prospectivity." Similarly, the only reference to pure prospectivity in *Harper* appeared in the majority's dictum, and the separate dissenting and concurring opinions, none of which ruled on the bounds or propriety of pure prospectivity with any more finality than *Beam*.[3]

---

[3] As Justice O'Connor remarked in her dissent, "the question of pure prospectivity is not implicated here…there is no reason for the Court's careless dictum regarding pure prospectivity, much less dictum that is contrary to clear precedent." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 116, 116 (1993). Justice Kennedy agreed, stating in his concurring opinion, "I remain of the view that it is sometimes appropriate in the civil context to give only prospective application to a judicial decision.

A useful analysis of the issue in this case is set out in *Collins v. DKL Ventures, LLC.* Although *Collins* reluctantly held in favor of retroactivity, it deftly illustrated how the loose ends in *Beam* and *Harper* have led to reasonable disagreement over proper application of *Weil*.[4] It made particular note that a previous district court case out of Colorado applying the Regulation retroactively, *Beltran v. Interexchange, Inc.*, 176 F.Supp.3d 1066 (D. Colo. 2016), did not add to its analysis because neither the parties nor the judge therein had raised the issue of whether the *vacatur* at issue in *Weil* affected the effective date of the Regulation. Accordingly, *Collins* considered the viability of a prospective approach,[5] but resigned itself to retroactivity by invoking the *Beam* "failsafe" that, "when the Court has applied a rule of law to the litigants in one case[,] it must do so with respect to all others." *Collins*, at *5. *Collins* acknowledged *Weil* did not actually apply its new rule of law to any parties, but noted other courts, such as *Kinkead*, had since done so. *Id.* at *5. *Collins* also conceded the situation before it was not strictly within the terms of *Beam*, but reasoned that since other courts had begun holding employers responsible for overtime as of January 1, 2015, to hold otherwise would risk the selective prospectivity that *Beam* rejected. *Id.* at *6.

Interestingly, *Collins* expressed no qualms about *Bangoy* and other proponents of prospectivity relying on the case of *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999). If anything, *Collins* accepted that *MCI* is instructive on the issue of prospectivity, just not

---

Prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding." *Id.* 110.

[4] It stated, "this Court […] instinctively favors the warts-and-all appeal of a pragmatic approach over an approach that is easy to implement but requires intellectual gymnastics to justify. It favors compliance with all laws as currently stated. Unfortunately, however, this seems to be a minority view, and it appears that the Supreme Court prefers the opposite." *Collins*, at *3.

[5] The court declined prospectivity, "perhaps most significantly," because the defendants did not even argue it. It explained, "[t]he question of whether and under what circumstances a new rule of law should be given purely prospective effect is a complex and difficult one, informed by intricate rules and interlocking precedents, and the [d]efendants' motion briefing does not the guide the Court down such a path." *Collins*, at *6.

controlling, and keenly observed that *Kinkead* rejected the defendant's reliance on *MCI* without explanation. In sum, *Collins* played it safe by siding with the majority, but seemed to leave clues imploring other courts to return to a more pragmatic approach if given the opportunity.

Integrity requests this Court take that opportunity and join other courts following the more pragmatic approach, which in this circumstance is full prospectivity. By building on the analysis in *Collins* and giving *MCI* the full consideration it deserves, the distinguishing elements of this situation come into focus and underscore why this is one of admittedly few occasions deserving of an exception to retroactivity. *MCI* is far more comparable to the unique posture of *Weil* than the cases cited in Plaintiff's opposition. It was in *MCI* that a court seemed to pinpoint the same issue here, observing, "[t]he …regulations in question go beyond merely interpreting the statute. They create new legal obligations that have the force of law in their own right. The court perceives a crucial distinction between applying a new interpretation of a law that admittedly was in effect during the relevant time period, versus applying a substantive regulation that never was in effect to begin with." *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d at 1163.

Plaintiff requests this Court focus instead on the portions of *Collins* that borrow from *Kinkead*, and argues that reliance on existing law *alone* does not justify departing from the general rule of retroactive application. While that overall principle may be true, Integrity disagrees with the precursor assertion in *Kinkead* that reliance on the D.C. District Court's *vacatur* would have been unjustified simply because "[the defendant employers] were doubtlessly aware of a likelihood that the D.C. Circuit would do just what appellate courts often do—reverse the decision of a district court." While employers may have foreseen the likelihood of appeal, and even the possibility of reversal, it is unrealistic to stand on hindsight and insist that employers should have foreseen a likelihood that reversal would immediately make them liable for violation of the FLSA when the Regulation had never even become effective.

Most importantly, the current split among courts on this very issue is an indication that employers could not predict the likelihood of such an outcome with any accuracy.

Additionally, the issue in this case is about more than Integrity's reliance on existing law prior to *Weil*—it is about the limits of retroactivity where a law has not yet gone into effect by the time a final judicial order affirms the authority of the rulemaking entity to make that particular law. For that reason, this case is distinguishable from the cases previously cited herein, as well as cases like *Reynoldsville Casket Co*. In that case, the Supreme Court dismissed a personal injury claim on the basis the Court had recently interpreted the tolling statute upon which the plaintiff relied and found it to be unconstitutional. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). Having dismissed the previous case in which it declared the statute's unconstitutionality,[6] the Court was bound to apply the same law, and thus to dismiss the case despite the claimant's reliance on the statute while it was still in effect. If anything, *Reynoldsville*'s thorough effort in distinguishing cases cited by the claimant, in which retroactivity was limited or foreclosed altogether, provides a clear indication there are necessary limits on retroactivity where special circumstances exist.[7]

The issues in this case, and every other in which courts are now grappling with how to apply *Weil*, present special circumstances warranting prospectivity, though they may not fit neatly into any one category in *Reynoldsville*'s non-exhaustive list. Unlike every pre-*Weil* case Plaintiff cites, where retroactivity appropriately applied a new interpretation to an *already-existing* law, the Regulation in this instance had never previously taken effect, and therefore the ruling upholding the DOL's authority can only permit the Regulation to apply prospectively. Additionally, Integrity is not requesting a special exception based on its own subjective reliance while the Regulation is applied retroactively to every other employer, nor is it among just a handful of businesses affected. *Weil* was brought by trade associations representing home care agency employers as an abstract facial challenge to the DOL's authority to issue and implement the Regulation. When the Circuit Court reversed the District Court and remanded, it did not hold any particular employer liable for overtime accruing between January 1, 2015 and October of 2015; it merely declared that "the regulation is valid," without comment on the prospective or retroactive effect of that ruling. The wide-reaching scale of the Regulation, combined with the number of businesses which would suffer from unanticipated retroactivity of the previously-non-existent law, justify fully prospective application under these circumstances.

---

[6] That case was *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 895 (1988). Notably, the Court in that case declined to consider the appellant's argument that its ruling should be applied prospectively only because that argument was raised for the first time in appellant's reply brief and not presented to the courts below.

[7] It states "…as courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case. Thus, a court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of 'finality' present in the *Teague* context, that limits the principle of retroactivity itself." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758–59 (1995).

III. In the alternative, this Court should grant partial dismissal of Plaintiff's Amended Complaint, dismissing any purported claims before October 13, 2015.

Plaintiff's final argument in opposition to Defendants' Motion to Dismiss is that, even if retroactivity does not apply, the latest possible "effective date" of the Regulation is October 13, 2015, when the mandate was issued. She suggests that even with an effective date of October 13, 2015, Integrity must have violated the FLSA because it did not begin paying overtime until one month later on November 13, 2015. Integrity denies that it violated the FLSA by doing so. However, if the Court declines to grant Integrity's Motion to Dismiss in its entirety, based on that argument, Integrity prays in the alternative that the Court dismiss the purported claims in Plaintiff's Complaint to the extent they are based on work performed *prior* to October 13, 2015, and that it only deny Defendant's motion to the limited extent the purported claims in the Complaint are based on work performed *on or after* October 13, 2015.

As a final note, Plaintiff's Amended Complaint should be dismissed because it is predicated on the disingenuous allegation that Integrity acted with knowing, willful, or reckless regard of the law in failing to pay overtime. On the very face of the Amended Complaint, it is impossible for Plaintiff to make such a claim. Regardless of how the FLSA was impacted when the mandate was issued, even if the Regulation were given retroactive effect dating back to January 1, 2015, nothing about that development would change the fact of Integrity's state of mind during the time when the *vacatur* was still valid—Integrity believed, correctly so, that it was following then-existing law. Integrity might have *hoped* the Regulation would be vacated, and that it would remain that way, but such hope is not converted to bad faith when the law changes, nor would Plaintiff's potential entitlement to any remedy somehow permit that presumption.

For the foregoing reasons, and for the reasons set forth in Defendant's original Suggestions in Support (Doc. 33), Integrity respectfully prays this Court grant its Motion to Dismiss Plaintiff's Amended Complaint.

Respectfully submitted,

BAIRD LIGHTNER MILLSAP P.C.

By /s/ *Katherine A. O'Dell*

Tina G. Fowler
Missouri Bar No. 48522
tfowler@blmlawyers.com

Katherine A. O'Dell
Missouri Bar No. 65076
kodell@blmlawyers.com

1901C South Ventura
Springfield, Missouri 65804
Telephone: (417) 887-0133
Facsimile (417)887-8740
Attorneys for Defendant Integrity

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of March, 2017, I electronically filed the above and foregoing document using the Court's e-filing system which sent notification to the following:

George A. Hanson
Stueve Siegel Hanson LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112

Philip Bohrer and Scott E. Brady (pro hac vice)
Bohrer Brady, LLC
8712 Jefferson Highway, Suite B
Baton Rouge, LA 70809

/s/ Katherine A. O'Dell